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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ex Parte Presentation

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, SW, Room TWB-204
Washington, DC 20554

Re In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor to SBC Communications, Inc., Transferee, CC Docket No. 98-141

Dear Ms. Salas:

On August 27, 1999, and on September 7, 1999, SBC and Ameritech submitted *ex parte* letters that suggested revised conditions to their proposed merger. The applicants assert (Aug. 27 *ex parte* at 2) that these revised conditions would be more stringent than the earlier set of conditions they proposed on July 1, 1999. In reality, those revised conditions, like the original proposal, would not remotely compensate for the significant anticompetitive effects of the merger, and in many instances would perversely exacerbate those effects.

Although the applicants claim to be responsive to the myriad and wide-ranging criticisms of the original conditions submitted by competing LECs and other interested parties, the revised conditions consistently fail to incorporate substantive changes suggested by those parties. Thus, where parties submitted pro-competitive improvements to the original conditions that would help open SBC/Ameritech's local markets, nearly all of those revisions were simply ignored. And where ambiguities in the original conditions were pointed out, SBC/Ameritech's revised conditions often resolve the uncertainty through

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clarifications that ensure that the condition would provide no pro-competitive benefits, and allow SBC/Ameritech to retain the ability to discriminate against new entrants to local markets. It cannot be surprising, therefore, that outside observers have concluded that SBC/Ameritech's revised conditions result in nothing but "miniscule changes to the terms." Legg Mason, Research Notes, Sept. 2, 1999.

Because the revised conditions changed so little of substance, nearly all of the critiques of the original conditions submitted by AT&T and other parties remain equally valid for the revised conditions. In the remainder of this letter, AT&T will describe some of the more fundamental problems with the proposed revisions. Although this analysis does not enumerate all of the concerns that SBC/Ameritech left unaddressed or all of the ambiguities that were resolved in favor of SBC/Ameritech, it does demonstrate that the revised conditions do not, on balance, improve upon the original conditions and are in several significant respects worse.

1. Carrier-to-Carrier Promotions. The revised conditions relating to the so-called "promotions" of unbundled loops, resale, and UNE-P are substantially unchanged, *see* Aug. 27 *ex parte*, App. A ¶¶ 45-52 (hereinafter "Revised Conditions"), and thus remain anticompetitive and discriminatory. Most fundamentally, the revised provisions continue to violate numerous provisions of the Act. For example, by capping the number of services and facilities subject to the promotions, the revised conditions violate the nondiscrimination requirements of section 251(c)(3), 251(c)(4) and 252(i) of the Act. *See* AT&T Comments on the Proposed SBC-Ameritech Merger Conditions, App. A at 83-86 (hereinafter "AT&T Comments"). Even if SBC/Ameritech were correct – which they are not – that section 251 does not require the offering of these arrangements, they remain subject to the nondiscrimination provisions of the Act, including section 252(i). Indeed, as at least three state commissions have held, section 252(i) requires incumbent LECs to provide network element combinations to all requesting CLECs – even if not mandated by section 251(c)(3) – if the incumbent LEC offers terms for UNE combinations to one CLEC.[1] Significantly, SBC/Ameritech have offered no "cost" or other legitimate justification for these caps; rather, the caps are being imposed solely because of, and for the purpose of preserving, SBC/Ameritech's market power. Accepting such a justification would turn the nondiscrimination provisions on their head.

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[1] *See* AT&T Comments, App. A at 85 & n.113 (citing Order, *Approval of the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc. and the Other Phone Co. Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996*, Case No. 98-165 (Ky. PSC June 30, 1999); Order on Negotiated Interconnection Agreement, *Resale Agreement Between BellSouth Telecommunications, Inc. and the Other Phone Co.*, Docket No. P-55, SUB 1144 (N.C. PUC June 23, 1999)); *see also* AT&T July 29 *Ex Parte* (attaching those decisions and Further Order, *Notice of Cancellation of Previously Approved Interconnection Agreement Between The Other Phone Company d/b/a Access One, Inc. and BellSouth Telecommunications, Inc and Request for Approval of a New Interconnection Agreement Between the Parties*, Docket U-3964 (Ala. PSC July 15, 1999)).

Further, by restricting the services CLECs may provide using the promotions, the revised conditions violate section 251(c)(3) and several Commission rules which expressly permit a CLEC to use UNEs "for the provision of a telecommunications service." *See* AT&T Comments, App. A at 86-89. The revised conditions, however, would continue to permit CLECs to use the promotions only for residential service and only for POTS and basic ISDN service. Revised Conditions ¶¶ 46e, 48, 51. Numerous other "telecommunications service[s]" such as Centrex and advanced services would be unlawfully excluded.

2. Advanced Services Conditions. SBC/Ameritech substantially revised the advanced services conditions in their August 27 *ex parte* and again in their September 7 *ex parte*, but in each case the new provisions not only retain some of the most objectionable terms of the original condition but often – under the guise of "clarifying" the terms of the conditions – substantially exacerbate their anticompetitive and discriminatory effects.

As an initial matter, the new conditions expressly provide that they are sufficient to permit SBC/Ameritech's advanced services affiliates to evade the legal obligations imposed on incumbents by section 251(c) of the Act. *See* Revised Conditions ¶ 3. That is contrary to the Act. *See* AT&T Condition Comments, App. A at 56-61. Moreover, the basis for that claim – the revised conditions' provisions for structural separation – remains far weaker even than those contained in section 272 (which themselves were not designed to determine when a LEC affiliate would cease being the LEC's "successor or assign") and would assure that the arrangement would be discriminatory. *Id.* at 61-71. Indeed, the structural separation between SBC/Ameritech and their advanced services affiliates that the *ex parte* touts as "unprecedented" is in fact a sham: by purporting to "clarify permissible and impermissible relationships," Aug. 27 *ex parte* at 4, the revised conditions in fact would permit the companies to integrate their operations in a manner that includes broad and inherently discriminatory exceptions to section 272 that render their limited separation provisions meaningless.

The revised conditions, for example, would permit SBC/Ameritech incumbent LECs and their advanced services affiliates to engage in "customer care" on an exclusive basis. Section 272, however, nowhere permits the sharing of customer care. Even if section 272 did authorize the exclusive sharing of customer care functions (as it does not), the revised conditions seek to further integrate the operations of SBC/Ameritech incumbent LECs and their affiliates by defining both that phrase and the term "joint marketing" in a manner extends beyond any reasonable construction. *See, e.g.*, Revised Conditions ¶¶ 3a, 4b, 4e, 4i, 4j, 4l. While section 272(g) merely authorizes joint marketing, the revised conditions would permit incumbent LECs to perform significant "after the sale" activities for their affiliates on an exclusive basis, including complaint resolution, balance inquiries, account closure, and billing and collection.

The inadequacy of the revised conditions is further underscored by the fact that they would permit SBC/Ameritech incumbent LECs to provide billing and collection (B&C) services to affiliates in a manner that SBC has admitted would violate section 272. In a prior Commission proceeding, SBC argued that it was unnecessary to re-regulate the B&C services its incumbent LECs provide to IXCs, because section 272(c) would require them to provide on a nondiscriminatory basis the same B&C services they provided to their section 272 affiliates.[2] The revised conditions, however, grant SBC/Ameritech affiliates the exclusive right to have their charges appear on the same bill as charges for SBC/Ameritech's incumbent LECs, relegating competitors to a "separate bill envelope." Revised Conditions ¶ 3b.[3] This provision is patently discriminatory in a telecommunications marketplace in which providers compete fiercely to offer varied services on a single bill. Moreover, because the conditions' B&C provisions do not limit this exclusive arrangement to "advanced services," SBC/Ameritech could refuse to provide nondiscriminatory access to B&C for any service its affiliate opted to provide.

The revised conditions' provisions regarding operations, installation and maintenance (OIM) likewise are facially discriminatory. Although the Commission's *Non-Accounting Safeguards Order* unequivocally prohibited the sharing of OIM functions because "[a]llowing a BOC to contract with [an] affiliate for [OIM] services would *inevitably* afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors,"[4] the revised conditions are rife with terms that permit SBC/Ameritech incumbent LECs to perform significant work, under the rubric of OIM, on behalf of the advanced services affiliate. *See, e.g.*, Revised Conditions, ¶¶ 3b, 4a, 4c, 4g, 4h, 4k.[5]

The "clarifications" of the original conditions would enable SBC/Ameritech to substantially integrate the operations of their incumbent LECs and their advanced services affiliates, and would allow the ILECs to provide significant

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[2] *See* Comments of SBC, filed July 25, 1997, at 17 in MCI Telecommunications Corp. Petition for Rulemaking: Billing and Collection Services Provided By Local Exchange Carriers For Non-Subscribed Interexchange Services, DA 97-1328/RM No. 9108.

[3] That the revised conditions provide that the exclusive billing for the affiliate "shall be stated on a separate page" than the incumbent LEC's charges (¶ 3b) is irrelevant: section 272(c) requires that billing and collection terms – whatever their content – be made available equally to other carriers.

[4] First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, 11 FCC Rcd 21905, ¶ 163 (1996) (emphasis added).

[5] The revised conditions also provide (¶ 3c) that OIM services "are not subject to forward-looking pricing methodologies." This provision would permit SBC/Ameritech to engage in a classic "price squeeze" by pricing OIM services at supra-competitive rates that their advanced services affiliates could incur without any effect on SBC/Ameritech's overall costs.

support to their affiliates on an exclusive basis.[6] In addition, the revised conditions retain almost all of the harmful provisions of the original version. As just one example, the revised conditions continue to excuse SBC/Ameritech's advanced services affiliates from compliance with many of the provisions of section 272, including the audit requirements of section 272(d) and the sunset provisions of section 272(f), for which SBC/Ameritech substitute a shorter sunset. *See* Revised Conditions, ¶¶ 3, 12.

3. Performance Measurements. The revised condition relating to performance measures, despite substantial criticism from AT&T and other commenters, is also essentially unchanged, and therefore would still provide no pro-competitive, market-opening benefits. Virtually all of the criticisms of this condition that AT&T made in its comments on the original condition apply equally to the revised condition. *See* AT&T Comments, App. A at 1-27. For example, the revised condition still would require SBC/Ameritech to provide only a small subset of the measures that are necessary to determine whether incumbent LECs are meeting their statutory obligations. *See id.* at 12. Moreover, even the few measures that are provided pursuant to the revised condition remain ill-defined and would be skewed in favor of SBC/Ameritech. *Id.* at 15, 19-21. And just as with the original condition, the revised condition would not require SBC/Ameritech to provide parity of access for many measurements, but only to meet arbitrary benchmarks. *Id.* at 16-21.

The one ostensible revision to the condition that might be characterized as an "improvement" is an 11 percent increase in the maximum penalties for non-compliance. Aug. 27 *ex parte* at 5-6. But that theoretical increase in exposure would be more than offset by a significant reduction in the likelihood that penalties would be incurred at all. Under the revised conditions, SBC/Ameritech would make no payments unless they fail to comply with a standard for three consecutive months for CLECs in the aggregate or for six months in a year. Revised Conditions, Att. A, ¶ 9.[7] Moreover, the revised condition retains the caps and

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[6] In another "clarification" that unjustifiably favors SBC/Ameritech, the new advanced services conditions purport to revise the definition of advanced services to "address[] head-on concerns raised by commenters." Aug. 27 *ex parte* at 4 (citing AT&T Condition Comments, App A at 63-64). To the contrary, the revised condition continues to define advanced services more broadly than did the Commission's recent order on the Section 706 NOI. There is simply no valid reason to permit the conditions to utilize a different definition than that adopted by the Commission earlier this year.

[7] Thus, under the new conditions, SBC/Ameritech could discriminate against CLECs as a whole for five months out of the year (so long as performance were not deficient for three consecutive months) with no penalties whatsoever. Moreover, because penalties would apply only if performance is deficient as to CLECs in the aggregate, the new condition would provide no remedies whatsoever for poor performance to an individual CLEC. The prior plan, though patently inadequate overall, at least would have had some protections against this practice. And while the original condition would have applied at least some penalties immediately after deficient performance was reported, the revised condition would delay the application of any sanctions for a significant period.

other offset provisions that further reduce Applicants' potential exposure to penalties -- even if their performance were in fact discriminatory.[8] *See* AT&T Comments, App. A at 7-12. For all of these reasons, the "Performance Plan" condition as set forth in the revised proposal does not constitute the kind of "private and self-executing enforcement mechanism that [is] automatically triggered . . . without resort to lengthy regulatory and judicial intervention," thereby preventing "backsliding" of performance, that the Commission has found necessary to be consistent with the public interest.[9]

In this regard, AT&T notes that in contrast to the corresponding condition in SBC/Ameritech's original proposal, the revised condition on performance measures could expire as soon as SBC/Ameritech receive approval under section 271. Revised Conditions, ¶ 24. Because the Commission has elsewhere recognized that the prevention of "backsliding" is particularly important after an RBOC receives such approval, AT&T presumes that the sunset of the performance measures condition merely reflects the view that it will be superseded by more rigorous measures and remedies by that time. The Commission should clarify in that this is in fact the basis for the sunset.

4. OSS Interfaces. The revised condition on OSS interfaces likewise fails meaningfully to address nearly all of the significant defects found in the original condition. In particular, the revised condition would preserve the lengthy time frames for SBC/Ameritech to achieve uniformity in their OSS interfaces. In addition, SBC/Ameritech have not merely retained the biased aspects of the arbitration process, but have strengthened that bias. Given these significant flaws, the few improvements incorporated into the revised OSS interfaces conditions - an improved arbitration timetable and a delayed sunset - could not provide any substantial pro-competitive benefit with regard to uniform OSS interfaces.

Specifically, the revised condition still would permit SBC/Ameritech far too much time - up to 30 months - before they must deploy uniform interfaces. Revised Conditions ¶ 31. In recognition of these extremely long deployment periods, the revised condition now would not sunset until three years after deployment of uniform interfaces, which would be an improvement, but one that merely was necessary to ensure that the condition did not expire before any uniform interfaces were even deployed.

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[8] The annual and monthly caps on penalties set forth in the revised condition are, moreover, even lower than the caps in the plan adopted by Texas, for example.

[9] *Application of BellSouth Corp. et al., for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20559, ¶ 364 (1998); *see* AT&T Comments, App A at 4-5.

Further, the revised condition still apparently provides that, in the event that the parties cannot agree on uniform OSS interfaces, SBC/Ameritech – but not a CLEC – can submit a plan for development of interfaces to the Common Carrier Bureau. Revised Conditions ¶¶ 28b, 31b. Even more unfair are the provisions for selecting arbitrators: although the original condition was vague, the revised condition makes clear that *only* SBC/Ameritech could nominate arbitrators, and that CLECs would be forced to accept that nomination. Revised Conditions, ¶¶ 28b-c, 31b-c. Likewise, the revised condition retains the provisions that would allow only SBC/Ameritech to nominate subject matter experts to assist the arbitrator, and that would pre-approve Telcordia – the former RBOC-owned BellCore – as a subject matter expert. *Id.* Although the revised condition would in one respect improve the arbitration process by setting firm deadlines for completion of the arbitration, the approval of these blatantly one-sided provisions threaten the integrity of and any benefits that may be achieved through the process. What possible public interest is served by giving one party a virtual veto over the arbitrator and the consultants upon whom it will rely?

Finally, the revised OSS interface condition contains several other provisions that are weaker than even the terms of the original conditions, most notably those providing for smaller penalties for non-compliance and those containing loopholes that could permit SBC/Ameritech to avoid obligations to follow effective change management principles. Thus, SBC/Ameritech's revised condition not only *lowers* the penalties (e.g., by providing for a cap even for "willful" violations), but, more fundamentally, but significantly limits the circumstances under which penalties would be imposed. For example, under most circumstances, the penalties could be incurred only within the first three days after a missed target date, effectively capping penalties at $300,000.[10] As for change management, the revised condition does not contain a single one of the very few basic substantive principles suggested by AT&T. SBC/Ameritech still makes no commitment regarding the terms of the uniform change management process that it will propose. Further, it retains the lengthy 12 month implementation period, and adds a loophole of possibly enormous breadth: SBC/Ameritech need only "implement those aspects of the uniform change management process that are consistent with state commission rulings, agreed-to with the CLEC participants and feasible." Revised Conditions ¶ 32. The precise scope of this language is unclear, and it could provide SBC/Ameritech with a basis to object to implementing an effective change management process, simply by asserting a claim that the process

[10] Revised Conditions, ¶ 28(c)(3). The penalties could also apply for time periods when SBC/Ameritech admits that or is found not to be complying with a target date. *See id.* Because SBC/Ameritech will not likely admit to missing a target date, and no neutral party is designated to determine either SBC/Ameritech's compliance with target dates or order that it correct any noncompliance, the likelihood that these provisions will result in substantial penalties does not seem significant.

is infeasible. Even if those claims had no merit, their assertion could enable SBC/Ameritech to delay or withhold effective change management.

5. OSS Charges. SBC/Ameritech's revision of the proposed OSS charges condition provides another egregious example of how the revised conditions have been "clarified" in a way that confirms that they would not provide any pro-competitive benefits. As AT&T showed, the original condition was vague: it appeared to preclude charges for accessing OSS, yet simultaneously preserved SBC/Ameritech's rights to recover costs of developing and providing OSS. AT&T Comments, App. A at 11-12. SBC/Ameritech have now revised and re-titled the condition "to clarify its intent," Aug. 27 *ex parte* at 6, and have made clear that the revised condition would not in fact "waive" any OSS charges, as the original condition's title stated, but merely would "restructur[e] OSS charges." Revised Conditions ¶ 35. Under this restructuring, SBC/Ameritech would eliminate certain OSS charges of $3600 per month per SBC state, but nothing in the revised condition would seem to preclude SBC/Ameritech from attempting to recover the costs associated with those charges through some other charge, and indeed the very title of the condition implies that SBC/Ameritech will in fact "restructure" its OSS charges precisely to attempt to accomplish that result. The condition as revised, therefore, not only no longer would "waive" any OSS charges, but would encourage SBC/Ameritech to engage in a shell game whereby OSS charges are withdrawn, but then later reinstated in some other form. Such a condition is meaningless and could not possibly serve the public interest.[11]

6. Collocation Compliance. The revised condition on compliance with the Commission's collocation rules is almost exactly the same as the original condition, and would also provide no significant public benefit. Thus, the revised condition still would permit the auditor to determine unilaterally and without any public notice or comment the scope of the audit, even over the objection of the Commission. Revised Conditions, ¶ 40a; *see* AT&T Comments, App. A, at 30-31. And the revised condition would not require SBC/Ameritech or its auditor to take any significant steps in conducting the audit until after the merger closes. *See id.* at 29-30. Most significantly, the revised condition would continue to allow the auditor complete discretion in whether to contact CLECs or state commissions, even though they possess extremely relevant information regarding SBC/Ameritech's compliance. *See id.* at 31.

On the fundamental issue of determining compliance with the Commission's collocation rules, the revised condition takes a step backward and would permit the

[11] In addition, although SBC/Ameritech pledge to recover OSS costs "in accordance with applicable federal and state pricing requirements," Revised Conditions, ¶ 35, the conditions should explicitly state the standard under which OSS charges could be recovered, as AT&T had proposed. *Cf.* AT&T Aug. 9 *ex parte* at 6 (providing that OSS charges must be recovered on a nondiscriminatory basis considering network usage of all carriers, including the incumbent).

SBC/Ameritech-nominated auditor even *more* responsibility to assess matters over which it has no expertise or authority: SBC/Ameritech's compliance with the Commission's rules. *See id.* at 28, 31, 33. The revised condition makes explicit that the auditor's opinion is not limited to certifying whether SBC/Ameritech has filed tariffs or amendments to its interconnection agreements, but is also to include a determination "regarding whether the terms and conditions" offered by SBC/Ameritech "comply with the [Commission's] collocation requirements." Revised Conditions ¶ 39; *id.* ¶ 40 (the auditor would issue an "opinion . . . regarding SBC/Ameritech's compliance with the Commission's collocation requirements"). That is so notwithstanding the fact that in order to make such a determination, the auditor would have to resolve several disputed issues regarding the interpretation of the Commission's rules. *See* AT&T Comments, App. A at 32-33.

SBC/Ameritech point to two revisions to the condition as responsive to commenters and beneficial to competition, but they are either of little value, or potentially counterproductive. First, with regard to access to the audit work papers – which could be critical to judging the accuracy of the audit findings and useful evidence in proceedings before the Commission – the revised condition now grants access to state commissions, but continues to deny access to CLECs (even subject to a protective order). Because a state commission may lack the resources to review and act *sua sponte* upon information contained in the workpapers, the failure to provide CLECs with access to the work papers remains a critical omission.[12]

Second, the provisions added by SBC/Ameritech calling for a refund to CLECs of non-recurring costs if SBC/Ameritech were to miss a due date for collocation space by more than 60 days are likewise problematic. Although a refund of charges for late cages could theoretically provide some incentive for SBC/Ameritech to provide collocation on a timely basis, the revised condition as drafted is so toothless that it is unlikely in fact to motivate SBC/Ameritech. Indeed, because the penalties apply only after the space is 60 days late, SBC/Ameritech may extend due dates by 60 days as a matter of course, knowing that penalties will not apply until then.

7. UNEs, Shared Transport, Pricing. The conditions relating to unbundled network elements, including shared transport, also remain essentially

[12] Significantly, the revised conditions are grossly biased in favor of SBC/Ameritech with regard to confidentiality of audit materials. For the collocation compliance audits of SBC/Ameritech, the audits are shrouded in secrecy, with the process itself and the underlying analysis shielded from interested parties, even under appropriate protective orders. By contrast, the so-called carrier-to-carrier provisions of the revised conditions not only provide SBC/Ameritech the right to hire auditors to monitor CLECs' compliance with the terms of the promotion (the necessity for which is itself suspect), but allow access to all audit information to numerous SBC/Ameritech personnel. *See* Revised Conditions ¶ 46e.

unchanged from the original conditions. As such, these conditions continue to provide almost no pro-competitive public benefit. *See* AT&T Comments, App. A at 73-78. Indeed, the only significant change to the condition on offering of UNEs is troubling: SBC/Ameritech commit only to "providing the UNEs and combinations they made available as of January 24, 1999," Revised Conditions, ¶ 53, the day before the Supreme Court's decision in *AT&T v. Iowa Utilities Board*, 119 S. Ct. 721 (1999). Ameritech, however, had consistently refused to provide shared transport and combinations with shared transport as of that date, and so the condition might be read (incorrectly, in AT&T's view) to legitimize the claim that, because the Supreme Court vacated Rule 319, the incumbent LECs can unilaterally determine whether to offer any unbundled elements. To avoid such a dispute, the revised condition should simply state that SBC/Ameritech will provide each network element defined by the Commission. *See* AT&T Aug. 9 *ex parte* at 15.

Both the original and revised conditions also fail to contain any meaningful provision addressing the pricing of unbundled network elements, notwithstanding the Commission's prior recognition in both its *Local Competition Order* and its order approving the merger of Bell Atlantic and NYNEX of the importance of pricing in achieving the Act's goals. AT&T's *ex parte* demonstrated that the establishment of an accelerated complaint procedure that could be invoked by CLECs to obtain a uniform resolution of key disputes as to the SBC/Ameritech's compliance with the Commission's TELRIC pricing rules would be enormously beneficial to competition. Nevertheless, the revised conditions, like the original proposal, fail to contain any such procedure, or any other meaningful provision addressed to pricing.

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In sum, the revised conditions should be rejected: they represent no significant improvement over the original conditions, and on several significant issues, they make matters worse.

Sincerely,

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Sincerely,

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cc: Chairman William Kennard
Commissioner Harold Furchtgott-Roth
Commissioner Susan Ness
Commissioner Michael Powell
Commissioner Gloria Tristani